Batavia Newspapers Corporation *and* Batavia Typographical Union No. 511, Printing, Publishing & Media Workers Sector of the Communications Workers of America, AFL–CIO, CLC. Case 3–CA–14635

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge and amended charge filed by Batavia Typographical Union No. 511, Printing, Publishing & Media Workers Sector of the Communications Workers of America, AFL–CIO, CLC, the Union, on October 13 and November 14, 1988, respectively, the General Counsel of the National Labor Relations Board issued a complaint on February 27, 1989, against Batavia Newspapers Corporation, the Respondent, alleging that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act. Copies of the charge, amended charge, complaint, and notice of hearing were served on the parties. Thereafter, the Respondent filed an answer denying the commission of any unfair labor practice.

On December 20, 1990, the parties filed a stipulation of facts and a motion to transfer the case to the Board. The parties agreed that the stipulation of facts and attached exhibits shall constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waived a hearing before an administrative law judge and the issuance of an administrative law judge's decision, and indicated their desire to submit the case directly to the Board for findings of fact, conclusions of law, and an order.

On March 28, 1991, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, all parties filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Batavia, New York, is engaged in the publication and distribution of a daily newspaper in the Batavia, New York area. During the year preceding the execution of the stipulation of facts, a representative period, the Respondent, in the course and conduct of its business operations, subscribed to interstate news services, published various nationally syndicated features, advertised various nationally sold products, and derived gross revenues in excess of $200,000. During the same period, the Respondent also purchased and received at its Batavia, New York facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issue presented is whether the Respondent violated Section 8(a)(5) and (1) by demanding, as a condition of reaching a contract, that the Union agree to its bargaining proposal entitled ''SUPPLEMENTAL AGREEMENT (Jurisdiction and Job Security)'' which is appendix A attached to this decision and which the complaint alleges is a nonmandatory subject of bargaining.

A. *Facts*

The Respondent publishes and distributes a daily newspaper in the Batavia, New York area. The Respondent and the Union agreed to honor a collective-bargaining agreement, effective by its terms through June 30, 1982, between Griswold & McWain, the Respondent's predecessor, and Batavia Typographical Union No. 511, which subsequently merged with the Union.[1] At all material times, the Union has been the exclusive representative of the Respondent's employees at the Batavia facility in an appropriate bargaining unit as described in the expired agreement's jurisdiction clause.[2] On December 20, 1990, when the stipula-

[1] The parties stipulated that the successor status of the Respondent and the Union and their assumption of the terms and conditions of the expired contract are not at issue here.

[2] The ''JURISDICTION'' clause provides:

> 2-01 Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as all composing room work and includes classifications such as: Typesetting machine operators; makeup men; markup men; machinists for typesetting machines; operators and machinists on all devices which compose type or film; operators of tape perforating machines and recutter units for use in composing or producing type; operators of all phototypesetting machines; operators of Optical Character Recognition machines (scanner); employes [sic] engaged in proofing, waxing and paste-makeup with reproduction proofs, processing the product of phototypesetting machines, including development and waxing; paste-makeup of all type, hand-lettered, illustrative, border and decorative material constituting a part of the copy; ruling; photo-proofing; correction, alternative and imposition of the paste-makeup serving as the completed copy for the camera used in the platemaking process. Paste-makeup for the camera used in this paragraph includes all photostats and prints used in offset work and includes all photostats and positive proofs of illustrations (such as Velox) where positive proofs can be supplied without sacrifice of qualify or duplication of effort.

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tion of facts was executed, there were seven unit employees.

In December 1982, the Respondent and the Union commenced negotiations for a successor contract. Since then, they have exchanged written and oral bargaining proposals and have met on 13 occasions,[3] but they have not been able to reach a successor agreement.

During negotiations, the Respondent introduced several proposals relating to the ''Jurisdiction'' clause of the expired agreement. In its earlier proposals, the Respondent sought a waiver of the jurisdiction clause ''insofar as the introduction of new technology is concerned.'' These proposals were eventually replaced by the Respondent's ''SUPPLEMENTAL AGREEMENT (Jurisdiction and Job Security),'' appendix A attached to this decision. Through appendix A and the above earlier proposals, the Respondent expressly sought to secure complete flexibility in the assignment of unit work to nonunit employees, subject to section 5 of appendix A described below, so that it could better take advantage of technological advances. From June 2 through August 17, 1988, appendix A remained the Respondent's position on the topics discussed therein.

Appendix A begins with an unnumbered introductory paragraph followed by six numbered sections. The opening paragraph of this document indicates that appendix A shall be in force through the term of the parties' successor contract and for the duration of their collective-bargaining relationship, unless changed by mutual agreement. This paragraph also states that appendix A ''shall supersede any inconsistent provisions'' of the successor contract. Section 1 of appendix A gives the Respondent the ''right to install and utilize an electronic system'' and permits that system to be utilized by ''all employees.'' Section 2 reserves specified work exclusively to the unit employees until such time as the new technology contemplated by section 1 is installed. Section 3 states the Respondent's right of concurrent or simultaneous utilization of nonunit employees on an electronic system for purposes other than the production of composing room work for the daily newspaper. This section also indicates that nonunit employees will not be assigned to perform unit work in the composing room. Section 4 confirms the Respondent's right to have nonunit employees perform any of the functions ''they currently perform,'' while section 6 provides a job guarantee to current unit employees until the year 2000 or the normal retirement age of 65, whichever occurs first, but subject to certain exceptions. Section 5 states that the Respondent

> in its sole discretion may assign any work reserved to the bargaining unit (composing room employees) under this Supplemental Agreement or the basic labor agreement to persons not in the composing room provided that:
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> (a) No current bargaining unit employee is laid off as a result of such assignment (current bargaining unit employees are: _____, _____, _____, _____, _____, _____, _____, _____); and
>
> (b) No current bargaining unit employee, as identified in (a) above, is involuntarily assigned work that is substantially outside the composing room department.

The Union made counterproposals to appendix A and the Respondent's other prior related proposals. Some of these counterproposals afforded the Respondent flexibility in the utilization of new technology in exchange for lifetime job security for the current unit employees. The Union sought this job security because of statements made by the Respondent during negotiations to the effect that it did not want any restriction on the placement of new technology and who would operate the new equipment, including equipment used in the performance of unit work, and that it could, subject to section 5 of appendix A, assign nonunit work to unit employees.

In negotiations, the Respondent stated that it would not agree to a collective-bargaining agreement without a resolution of the ''Jurisdiction'' issue that afforded it complete flexibility in the placement and operation of the new equipment to be used to perform unit work. At the last bargaining session held on August 17, 1988, the Union stated and proposed that it would not agree to any change in the existing jurisdiction clause of the expired agreement. An impasse in negotiations existed on August 17, 1988, based on the Respondent's insistence on appendix A as a total package.

B. *Contentions of the Parties*

The General Counsel and the Union contend that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse on appendix A. Applying the principles reaffirmed in *Standard Register Co.*, 288 NLRB 1409 (1988),[4] they maintain that appendix A is a permissive subject of bargaining because it allows the Respondent unfettered discretion to change unit scope at any time. They contend that any transfer or reassignment of composing room work to nonunit employees would change the scope of the unit. In their

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The employer shall make no other contract covering work as described above, especially no contract using the word ''stripping'' to cover any of the work above mentioned.

[3] The Respondent and the Union have met for collective-bargaining negotiations on December 17, 1982; February 1, July 28, and November 14, 1983; July 2, 1985; July 31 and November 24, 1986; March 2, June 10, and September 17, 1987; and March 3, April 20, and August 17, 1988. Neither party has refused to meet at reasonable times.

[4] In that case, the Board found that the employer's impasse proposal altering the established unit description was a permissive subject of bargaining.

view, the job protection for current unit employees contained in sections 5 and 6 of appendix A does not prevent the Respondent from unilaterally diminishing or eliminating the unit, a possibility under section 5 of appendix A. The Union further argues that its counterproposals offering to change the existing jurisdiction clause of the contract do not give the Respondent license to insist on appendix A, a permissive subject of bargaining.

The Respondent contends that its insistence to impasse on appendix A was not unlawful and urges the Board to dismiss the complaint in its entirety. The Respondent defends its action on the basis, inter alia, that appendix A represents a proposed change in work assignments and not unit scope. Relying on *Storer Communications*, 295 NLRB 72 (1989), enfd. sub nom. *Theatrical Stage Employees IATSE Local 666*, 904 F.2d 47 (D.C. Cir. 1990),[5] the Respondent urges the Board to find that appendix A is a mandatory subject of bargaining over which it could lawfully insist to impasse.

C. *Discussion*

This case highlights a common dilemma faced by employers and unions in the newspaper industry. During successor contract negotiations, the Respondent tried to negotiate changes that affected a longstanding contract clause combining unit description and work jurisdiction. To take advantage of certain technological advances, the Respondent admittedly advanced appendix A, a contract proposal providing for sole discretion in assigning certain unit work. The Union rejected this proposal. The Union objected not to the introduction of the new technology but to what it viewed as an attempt to change unit scope. It also feared that if appendix A was accepted, then a likely consequence would be a loss of unit jobs. Consequently, the parties reached impasse over appendix A.

This dispute centers on whether the Respondent's impasse proposal would change only work assignments and not the scope of the unit. The former constitutes a mandatory subject of bargaining and may be insisted upon to impasse; the scope of the unit is a permissive subject. *Standard Register Co.*, supra; *Boise Cascade Corp.*, 283 NLRB 462 (1987), enfd. 860 F.2d 471 (D.C. Cir. 1988).[6] As more fully discussed below, we conclude that the Respondent's proposal was a mandatory subject of bargaining.

As evidenced by its title and opening paragraph, appendix A, on its face, is intended to address ''jurisdiction'' and ''job security'' concerns as a ''supplemental agreement'' to any main successor contract reached by the parties. Appendix A explains that in this role it has the ability to ''supersede any inconsistent provisions in the basic labor agreement.'' Since no restrictions on coverage are specified anywhere in the proposal itself, appendix A thus has the capacity to replace any inconsistent provisions of the parties' main contract, including the existing jurisdiction clause, 2-01. We, however, find no inconsistency between the unit scope aspect of that clause and appendix A.

The jurisdiction clause defines both the Union's work jurisdiction and the existing unit as ''all composing room work.'' This clause then gives several illustrations by listing certain work classifications for unit employees and further describing other unit employees in terms of the specific work functions that they perform. Nowhere in appendix A does the Respondent specifically propose to eliminate or reword the main contract's unit description of ''all composing room work.'' See *Bremerton Sun Publishing Co.*, 311 NLRB No. 51, issued this same day. In addition, the parties themselves have not construed appendix A as an attempt to delete the phrase ''all composing room work'' from the jurisdiction clause.

With the arguable possible exception of section 5, appendix A essentially speaks in terms of work assignments. Section 2 assures that, until the new technology contemplated by section 1 is installed by the Respondent, particular work (e.g., keyboarding of certain legal notices, keyboarding of certain display advertising copy, all coding for display ads, and related equipment maintenance) shall be exclusively performed by unit employees. Section 3 allows nonunit employees to use, simultaneously or concurrently, the same new electronic system for work other than composing room work. Section 4 confirms the Respondent's right to have nonunit employees perform any of their current work functions.

The opening language of section 5 gives the Respondent the sole discretion to assign the work reserved by section 2, described above, or under the main contract to ''persons not in the composing room'' except in two limited situations referred to in provisos (a) and (b) of that section. According to those provisos, the Respondent may not reassign unit work to persons not in the composing room if such reassignment

[5] In that case, the court agreed with the Board's determination that a contract proposal submitted by the employer during contract negotiations concerned a change in work jurisdiction.

[6] In *Standard Register*, the employer proposed eliminating the unit description from the contract and sought ''unfettered discretion to redefine the unit at any time by changing the assignment of work.'' 288 NLRB at 1410. As the Board found, this proposal involved a permissive subject of bargaining because it permitted the employer to remove employees from their bargaining unit by assigning them work other than that set forth in the employer's proposal. Likewise, in *Boise Cascade*, a proposal concerning an employer's modernization change (i.e., consolidating five existing maintenance units) served to remove certain current maintenance employees from their bargaining unit and alter what union represented those employees. The Board, affirmed by the court, found a permissive subject was also at issue in that situation.

either causes one of the seven current unit employees to be laid off or involuntarily assigned ''work that is substantially outside the composing room department.''

In *Antelope Valley Press*, 311 NLRB No. 50, issued this same day, the Board recently adopted a new approach to resolving the kind of issue presented in the instant case. This new test is as follows. If the employer has insisted on a change in unit description, then such insistence is unlawful even if the unit is described in terms of work performed. On the other hand, if the employer has not insisted on changing the unit description, then it may seek an addition to the existing jurisdiction clause that would allow unit work to be transferred out of the unit, as long as the employer does not attempt to deprive the union of the right to assert that the individuals performing the work after the transfer are to be included in the unit.

Applying *Antelope Valley*, we reject the General Counsel's and Union's contention that in section 5 of appendix A the Respondent has attempted to alter the scope of the unit. As we stated before, we find that appendix A retained the main contract's unit description of ''all composing room work.'' We next observe that appendix A gave the Respondent the right to assign unit work to ''persons not in the composing room.'' The stipulated record fails, however, to establish that the quoted phrase was meant to preclude the Union from contending in unit clarification or other Board proceedings that the individuals who perform the transferred unit work assignments are to be included in the unit.[7]

We are also not persuaded by the General Counsel's and Union's argument that the Respondent's proposal seeks to change unit scope because section 5 would permit actions that in theory could reduce the size of the bargaining unit or alter its membership. In this regard, as we again recognized in *Antelope Valley*, any transfer of work from a bargaining unit has the potential to reduce the size of the unit.[8] Moreover, the same argument was specifically rejected in *Storer Communications*, supra. In that case, the existing jurisdiction clause defined the bargaining unit as ''comprised of all employees . . . who are engaged in the operation of portable electronic cameras and associated video tape equipment . . . .'' That clause also provided that the union had exclusive jurisdiction to perform certain work. During successor contract negotiations, the employer made proposals that removed some work from the Union's exclusive jurisdiction and permitted employees represented by another union to perform some of that camera work. The Board adopted the administrative law judge's conclusion that the employer's proposals represented a mandatory subject of bargaining because the proposed changes to the existing jurisdiction clause ''did not involve *who* [the union] represents but rather what these employees do.'' 295 NLRB 72, 78. In affirming the Board's decision, the reviewing court specifically observed that ''[t]he Board found that the Company proposals did not reduce the size of the bargaining unit, alter its membership, or permit the assignment of later-hired newscamera operators to a different union.'' 904 F.2d at 52.

In *Storer*, the clauses in issue—found by the Board and the court to involve work transfer—would have permitted the employer to assign bargaining unit work to other (nonunit) employees or to a subcontractor. In addition, the employer's proposal contained no provision that offered guarantees to the current unit employees similar to section 5 of appendix A. With optimal use of the authority it sought, the employer in *Storer* might well significantly diminish or eliminate the bargaining unit. Nonetheless, as the clause did not change who the union represented but rather what work the employees performed, the clause was deemed to affect work transfer rather than unit scope.[9]

Following the principles of *Antelope Valley*, we find that appendix A was directed at permitting the Respondent to transfer work and did not alter *who* the Union represented but rather *what work* the employees performed. The Respondent wanted more flexibility over the operation of its composing room and sought the sole discretion to assign composing room work as needed, subject to certain limitations. It did not seek to move job classifications or employees, and the Union would continue to represent the same group of employees. Therefore, we find that appendix A was a mandatory bargaining subject and the Respondent's insistence to impasse on appendix A did not violate Section 8(a)(5) and (1) of the Act as alleged. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

[7] Compare *Antelope Valley*, supra (the phrase ''persons outside the bargaining unit'' was not considered by the Board to exclude employees from the unit).

[8] For example, in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that under certain circumstances an employer can unilaterally subcontract away a unit's entire work assignment. See *Theatrical Stage Employees*, supra.

[9] See also *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615 (6th Cir. 1982), denying enf. 250 NLRB 1144 (1980), where the court held that an employer's proposal to change the work jurisdiction of its composing room employees involved a mandatory subject of bargaining. The court noted, inter alia, that there was no evidence that current bargaining unit employees would not continue to be represented by the union under the employer's proposal. Here, similarly, there is no evidence that bargaining unit employees will not continue to be represented by the Union under the Respondent's proposal.

APPENDIX A

NEGOTIATIONS BETWEEN

BATAVIA DAILY NEWS

—and—

ITU, LOCAL 511

SUPPLEMENTAL AGREEMENT

(Jurisdiction and Job Security)

This Supplemental Agreement on Job Security and Jurisdiction shall become effective on the date of its signing and its terms shall continue in force through the terms of the basic labor agreement dated _____, 19____ and for so long as there is a collective bargaining relationship between the Batavia Newspapers Corporation (i.e., the current owner, referred to herein as the ''Company''), and the union, unless changed by the mutual agreement of the parties hereto. This Supplemental Agreement shall supersede any inconsistent provisions in the basic labor agreement.

Section 1. The Publisher shall have the full right to install and utilize an electronic system, including but not limited to pagination technology, with OCR's, VDT's, line printers, processors and related equipment and devices in its business, and to that end and in view of the security provided herein, the basic labor agreement shall be applied and interpreted as permitting utilization of the electronic system by all employees of the Publishers, and as provided in the following sections.

Section 2. Except as otherwise provided herein, until technology as referred to in Section 1 is installed, employees covered by this Agreement, who are named in Section 5(a), shall continue to perform the following work:

(1) Keyboarding of two column legal notices, except for camera-ready notices;

(2) *Display Advertising Copy*—Keyboarding of all display advertising copy (including classified display) which must be keyboarded at the Company for typesetting and processing through the electronic composing system;

(3) *Coding*—All coding (typesetting instructions) fir display ads (including classified display);

(4) *Maintenance*—The maintenance of the equipment and devices within the system, except that maintenance which is provided by the manufacturer or lessor as a part of the standard services for the lease or purchases of the system;

Section 3. Work Other Than Composing Room Work—The Publisher's right of concurrent or simultaneous utilization of all devices in the electronic system by persons outside the bargaining unit for purposes other than the production of composing room work for the daily newspapers is not abridged by the provisions of this agreement (e.g., typesetting outside commercial work by non-bargaining unit staff in the composing room would not be prohibited by this Agreement since it does not involve the production of composing room work for the daily newspaper), and they shall not be so applied as to restrict production or hinder the business operations in any way. Although the jurisdiction of this contract is not exclusive, employees from other departments will not be assigned to perform the work of the bargaining unit in the room known as the composing room.

Section 4. Neither this Supplemental Agreement nor the basic labor agreement shall prevent non-bargaining unit personnel from performing any functions that they currently perform.

Section 5. Additionally, the Company in its sole discretion may assign any work reserved to the bargaining unit (composing room employees) under this Supplemental Agreement or the basic labor agreement to persons not in the composing room provided that:

(a) No current bargaining unit employees is laid off as a result of such assignment (current bargaining unit employees are: _____, _____, _____, _____, _____, _____, _____, _____, _____); and

(b) No current bargaining unit employee, as identified in (a) above, is involuntarily assigned work is substantially outside the composing room department.

Section 6. Further, the Company agrees that the employees identified in Section 5(a) above, who continue to have the ability and competence to perform the required work, will be assured a position, by this Agreement, until the year 2000, or normal retirement age of 65, whichever shall occur first, unless the position is vacated by retirement, resignation, death or discharge for cause. However, in event that the Company cease publications of the Batavia Daily News, this employment guarantee will cease. Further, in the event that a strike, lockout or ''Act or God'' results in a period of temporary suspension of the composing room operation, the guarantee will be suspended for such period of temporary suspension of the operation; and, in the event of an economic strike, the guarantee may be permanently lost should the Company hire permanent replacements for strikers.